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NO.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

PETER A. ASCANI, SR., INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF DAVID NATHAN ASCANI, PETER A. ASCANI, JR., ANNA SCHMIT, DARIUS ASCANI, JESSE ASCANI, MERCEDES REINERTH AND DARLEEN BOYLE

Petitioners

versus

DARRELL HUGHES AND TERRENCE DUFFY, INDIVIDUALLY AND IN THEIR CAPACITIES AS OFFICERS OF THE NEW ORLEANS POLICE DEPARTMENT, HENRY MORRIS, INDIVIDUALLY AND IN HIS CAPACITY AS CHIEF OF POLICE OF THE NEW ORLEANS POLICE DEPARTMENT, THE CITY OF NEW ORLEANS AND TRANSIT CASUALTY COMPANY

Respondent

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

JURISDICTIONAL STATEMENT

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10 pp

QUESTIONS PRESENTED BY APPEAL

1. Does the estate of a person killed by a city police officer, acting under color of state law and without due process of law, have a claim for relief for loss of life under 42 U.S.C. Sec. 1983 and the Fourteenth Amendment when the state law does not allow the estate to recover for loss of life?
2. Whether a sibling has a constitutionally-protected liberty interest in the continued society of an association with a fellow sibling.

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GROUNDS ON WHICH JURISDICTION IS INVOKED

1. Appellate proceeding;
2. Date of denial of writ by Louisiana Supreme Court June 28, 1985.

3. Notice of Appeal filed September 13, 1985 in Louisiana Supreme Court.

4. Statue conferring jurisdiction of appeal on this court: 28 U.S.C. 1257

CONSTITUTIONAL PROVISIONS AND STATUTES WHICH CASE INVOLVES

1. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law..." Fourteenth Amendment.

2. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be

subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress..." 42 U.S.C. Sec. 1983.

3. "The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter (title 42)...shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions

necessary to furnish suitable remedies and punish offenses against law, the common law, as modified, and changed by the constitution and statutes of the state wherein the court having jurisdiction of such civil or criminal case is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to govern the said courts in the trial and disposition of the cause..."

42 U.S.C. Sec. 1988

4. "A. Every act whatever of man that causes damage to another obligates him by whose fault it happened to repair it.

B. Damages may include loss of consortium, service, and society, and shall be recoverable by the same respective categories of

persons who would have had a cause of action for wrongful death of an injured person.

C. (1) The right to recover damages to property caused by an offense or quasi-offense is a property right which, on the death of the obligee, is inherited by his legal, instituted, or irregular heirs, subject to the community rights of the surviving spouse.

(2) As used in this Paragraph, property damages may include expenses or monetary obligations necessarily incurred by the obligee on account of such offense or quasi-offense; however, if the obligee is survived by any beneficiary enumerated in the following Paragraph of this Article, such expenses or obligations shall be recoverable by said beneficiaries.

D. (1) The right to recover all other damages caused by an offense or quasi-offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of:

(a) The surviving spouse and child or children of the deceased, or either such spouse or such child or children;

(b) The surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and

(c) The surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving.

(2) The survivors in whose favor this right of action survives may also recover the damages which

they sustained through the wrongful death of the deceased.

(3) A right to recover damages under the provisions of this Paragraph is a property right which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted, or irregular heirs, whether suit has been instituted thereon by the survivor or not.

E. As used in this Article, the words "child", "brother", "sister", "father", and "mother" include a child, brother, sister, father and mother, by adoption, respectively."

La. Civil Code Art. 2315

STATEMENT OF FACTS

In the early morning hours of Monday, February 7, 1983 officers Terrence Duffy and Darryl Hughes of the New Orleans Police Department, while on D.W.I. patrol duty, gave chase to a vehicle occupied by decedent, David Nathan Ascani. The vehicle driven by Ascani came to a stop on Poydras Street in front of the New Orleans Superdome. Officers Duffy and Hughes approached the Ascani vehicle on foot and, in a reckless and callous disregard of and indifference to the rights and safety of Ascani, opened fire on him. Three shots were fired. Ascani was shot one time through the left deltoid muscle. The bullet entered the chest cavity and pierced the jugular and trachea causing his death approximately one-half hour later. Officers Duffy and Hughes said

that they gave chase to the Ascani vehicle because he appeared to be a drunk driver. Subsequent tests showed that Ascani had no alcohol or drugs in his blood at the time of his death.

Ascani was survived by his father and six brothers and sisters. Actions under 42 U.S.C. Sec. 1983 and in tort under Louisiana Civil Code Article 2315 werebrought by the father and brothers and sisters of Ascani and by the father on behalf of the estate of Ascani. The questions presented for review herein were first raised in the trial court by a motion to dismiss for failure to state a cause of action. On June 11, 1984, the trial court dismissed the claims of decedent, Ascani's estate and his siblings. Appeal was taken to the Louisiana Fourth Circuit Court of Appeal where the decision of the trial court was affirmed on May 8, 1985. Writs were

denied by the Louisiana Supreme Court on June 28, 1985.

I

Does the estate of a person killed by a city police officer, acting under color of state law and without due process of law, have a claim for relief for loss of life under 42 U.S.C. Sec. 1983 and the Fourteenth Amendment when state law does not allow the estate to recover for loss of life?

There is no question that the Fourteenth Amendment (P. vi, supra) protects individuals from deprivation by a state or its officials of life without due process of law.

Clearly, under the Fourteenth Amendment, the killing of a person by a city police officer under color of state law and without due process of law is prohibited. In the case at bar, David

Nathan Ascani (Ascani) was deprived of his life without due process of law. He was not tried by a judge or jury; he was not even arrested or charged with any offense. He was summarily executed by two officers of the New Orleans Police Department. This outrageous act by these officers of the New Orleans Police Department is clearly prohibited by he Fourteenth Amendment and, therefore, provides the basis for a claim under 42 U.S.C. Sec. 1983. It is submitted that Ascani has a claim for relief for loss of life under the Fourteenth Amendment and 42 U.S.C. Sec. 1983. Further, he possesses that claim for relief even when state law would not allow his estate to recover for loss of life.

A claim for relief for a violation of the Fourteenth Amendment by a governmental actor is provided for by 42 U.S.C. Sec. 1983. The Fourteenth

Amendment protects individuals from deprivation by the state of life, liberty or property without due process of law. When the state does take the life, liberty or property of an individual without due process of law, 42 U.S.C. Sec. 1983 provides that individual with a claim for relief (P. vii, supra).

Further, the fundamental policies behind Sec. 1983 are twofold - compensation for and deterrence of unconstitutional acts committed under state law:

> "The policies underlying Sec. 1983 include compensation of persons injured by deprivation of federal rights and prevention of abuses of power those acting under color of state law." Robertson v Wegmann 436 U.S. 584, 591, 98 S. Ct. 1991, 1995 (1978); Carlson v Green 446 U.S. 14, 100 S. Ct. 1468.

One of the primary reasons Sec. 1983 was enacted was to remedy and deter

acts violative of the Fourteenth Amendment. The legislative history behind Sec. 1983 expresses an unequivocal concern for protecting the life of innocent victims from state officials, such as police officers. See Bell v Milwaukee 746 F. 2d 1205, 1239 (7 Cir. 1984). Ascani (or his estate) has a claim for relief for loss of his life under Sec. 1983. The civil rights acts do not specify many issues, such as the survivability of Sec. 1983 actions, who can sue when a civil rights victim is killed, or the measure of available damages. Bell v Milwaukee 746 F. 2d 1205, 1234 (7 Cir. 1984). Handling of deficiencies of this type in civil rights statutes is provided for in 42 U.S.C. Sec. 1988 (P. viii, supra).

Thus, Sec. 1988 invokes state law when civil rights statutes such as 42

U.S.C. Sec. 1983 are "deficient", unless the state law involved is "inconsistent with" the Constitution and federal law. See Robertson v Wegmann 436 U.S. 584, 587-588, 98 S. Ct. 1991, 1993-1994 (1978). As the Seventh Circuit explained in Bell v Milwaukee 746 F. 2d 1205, 1234 (7 Cir. 1984) Sec. 1988:

> "...establishes a three-step process for the selection of the appropriate substantive law in civil rights cases. First, the court must decide whether the civil rights acts are 'deficient' in furnishing a particular rule. If this inquiry is answered affirmatively, state law is examined to fill the interstices in the federal provisions... Finally, the state law must be disregarded in favor of the federal law if the state law is inconsistent with the meaning and purpose of federal statutory and Constitutional law."

Of fundamental importance is whether the application of state law "would be inconsistent with the federal policy underlying the cause of action..." Johnson v Railway Express

Agency, Inc. 421 U.S. 454, 465, 95 S. Ct. 1716, 1722. This court, in Robertson v Wegmann, 436 U.S. 584, 590, 98 S. Ct. 1991, 1995 (1978), explained:

> "In resolving questions of inconsistency between federal and state law raised under Sec. 1988, courts must look not only at particular federal statutes and constitutional provisions, but also at 'the policies expressed in (them).' Sullivan v Little Hunting Party, Inc. 396 U.S. 229, 240, 90 S. Ct. 400, 406 (1969)."

These policies again, include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law, i.e. deterrence. Robertson v Wegmann 436 U.S. 584, 585, 98 S. Ct. 1991, 1995 (1978). Clearly, then the policy of Sec. 1983 is that innocent victims should be compensated and local government officials should pay so that

others will know that they should not commit violations.

Therefore, since the civil rights acts are "deficient" in not specifying survivability of Sec. 1983 actions or who can sue when the civil rights victim is killed, reference must be made to Louisiana law to determine whether the Ascani estate has a claim for relief.

The appropriate provision is Louisian Civil Code Article 2315. Article 2315 provides for two types of actions only - a "survival action" and a "wrongful death action". A "survival action" is an action for damages sustained by the victim for which he could have recovered had he lived, such as the pain and suffering which he endured from the time of his injury to the time of his death. A "wrongful death action" is one for damages to survivors occasioned by the victim's

death. See, e.g., Callais v Allstate Insurance Company 334 So. 2d 692 (La. 1975). Recovery in a Louisiana wrongful death action or a survival action under Article 2315 cannot, however, include damages for the loss of life itself. As the Louisiana court in the case at bar stated, Article 2315 designates three classes of beneficiaries, and the estate of the decedent is not among these designated beneficiaries. Citing Roche v Big Moose Oil Field Truck Service 381 So. 2d 396 (La. 1980), the Louisiana court stated:

> "...Article 2315 designates three classes of beneficiaries:
> 1. The surviving spouse and child or children of the deceased, or either of such spouse or such child or children;
> 2. The surviving father and mother of the deceased, or either of them, if there is no spouse or child surviving; and
> 3. The surviving brothers and sisters of the deceased, or any of them, if there is no

spouse, child, or parent surviving.

> Persons not specified in Article 2315 are without a remedy...The estate of the decedent is not among the designated beneficiaries. Therefore, Mr. Ascani's claim on behalf of the estate does not state a cause of action." Ascani v Hughes 470 So. 2d 207, 209 (La. App. 4 Cir., 1985).

Had the police officers merely maimed Ascani, instead of killing him, he would have had a claim for relief under Sec. 1983 and he would have had a cause of action in Louisiana tort law against them. Since they killed him, according to the court below, he has neither the claim under Sec. 1983 nor the tort claim under Louisiana law. Therefore, it was actually to the advantage of the police officers to kill him rather than injure him. As the Seventh Circuit pointed out:

> "Moreover, if Sec. 1983 did not allow recovery for loss of life notwithstanding inhospitable

> state law deterrence would be further subverted since it would be more advantageous to the unlawful actor to kill rather than injure." Bell v City of Milwaukee 746 F. 2d 1205, 1239 (7 Cir. 1984).

All federal courts that have considered this question, which was reserved by this Court in Robertson (supra), have held that the estate of a person killed by a state officer without due process of law has a claim for relief for loss of life under Sec. 1983 and the Fourteenth Amendment even when the state law would not allow the estate to recover for loss of life. The facts in Bell v City of Milwaukee 746 F. 2d 1205, (7 Cir. 1984), were amazingly similar to the facts in the case at bar. Plaintiff brought an action for loss of life under Sec. 1983 on behalf of the estateof his son who had been killed by Milwaukee police officers. The court referred to Wisconsin law under the

"three-step process" described above and found that it did not allow for recovery of damages for loss of life itself. The Wisconsin law was almost identical to Louisiana Civil Code Article 2315 with respect to this issue. Wisconsin provided for a survival action and a wrongful death action. Bell, 746 F. 2d 1235-1236. The court held that the Wisconsin statute, which would have precluded recovery by the son's estate for loss of life, was inconsistent with the deterrent policy of Sec. 1983 and the Fourteenth Amendment's protection of life. The Bell case relied upon language from two Supreme Court decisions in coming to its conclusion:

> "As the Supreme Court observed in Carey v Piphus, 435 U.S. 247, 258 98 S. Ct. 1042, 1049..., 'It is not clear...that common-law tort rules of damages will provide a complete solution to the damage issue in every Sec. 1983 case'. Therefore, it is appropriate, as

> the Supreme Court had noted in regard to Sec. 1983 damage issues, to fashion, 'a federal rule responsive to the need whenever a federal right is impaired Sullivan v Little Hunting Party, Inc. 396 U.S. 229, 240 90 S. Ct. 400 406..."

In Guyton v Phillips, 532 F. Supp. 1154 (N.D. Calif. 1981), a federal court again ruled in favor of a claim remarkably similar to that of the instant plaintiff. In Guyton, the mother of a boy, shot and killed by police officers, brought suit on behalf of the deceased minor as administratrix of the estate under Sec. 1983. Under state survival law, the estate could not recover for pain and suffering sustained prior to death nor for the loss of life. Citing Carey v Piphus, (supra) for the proposition that state common law tort rules of damages may be inconsistent with the policy underlying Sec. 1983, to the court held that the estate was

entitled to recover for loss of life and pain and suffering. Plaintiff could, therefore, recover under Sec. 1983. The court cited both the compensation and deterrence policies underlying Sec. 1983. Guyton, (supra), 532 F. Supp. 1154, 1167-1168.

In Jaco v Bloechle 739 F. 2d 239 (6 Cir. 1984) the Sec. 1983 civil rights action of the decedent could not survive under Ohio law because, under that law, the survival claim had to be predicated upon the decedent's claim for damages sustained during his lifetime. Since the Jaco decedent died instantaneously, his cause of action for the infringement of his civil rights could not survive under Ohio law. In holding that the civil rights action survived despite the Ohio law which caused it to abate the Sixth Circuit stated:

"The Sec. 1983 objective of protecting individuals' civil liberties by providing compensation to the victim for an illegal deprivation of constitutional entitlements by state officers cannot be advanced, and is only undermined by deferring to a state law which decrees abatement..." Jaco 739 F. 2d 239, 244-245.

The Jaco court went on to discuss the second purpose of Sec. 1983, deterrence:

"Surely, Sec. 1983's further purpose to discourage official constitutional infringement would be threatened if Jaco were not permitted to champion her dead son's civil rights. Ohio survivorship law is then hostile to 'the constitution and the laws of the United States'. To afford effect to the expressions and corrections of the Supreme Court in Robertson v Wegmann, where, as here, the survival statutes of the foreign state are hostile to promoting deterrence, protection and vindication against Sec. 1983 civil rights infringements perpetrated under color of law, the federal court must implement the congressional intent by allowing survival." Jaco 739 F. 2d 239, 245.

The conflict between the Louisiana courts and all of the federal courts that have addressed this question is clear. It is, therefore, extremely important that this court make a specific pronouncement on the existence of a federal rule allowing the estate of victims killed under color of state law to recover for loss of life in a Sec. 1983 action notwithstanding restrictive state law. Bell v Milwaukee 746 F. 2d 1205, 1238 (7 Cir. 1984). In Robertson v Wegmann, 436 U.S. 584, 594, 98 S. Ct. 1991, 1997 (1978), this court explicitly declined to express any view on this question. Today's appeal affords this court its first clear opportunity to answer this question left open by the Robertson v Wegmann decision.

> "We intimate no view, moreover, about whether abatement based on state law could be allowed in a situation in which deprivation of federal rights caused death."

Robertson v Wegmann, 436 U.S. 584, 594, 98 S. Ct. 1991, 1997 (1978).

In Robertson v Wegmann, this court considered the same Louisiana Civil Code Article 2315 before the court in this case. In Robertson, however, plaintiff brought a Sec. 1983 action for malicious prosecution and died while his suit was pending of causes unrelated to the civil rights claim. The court held that, pursuant to Sec. 1988, the applicable Louisiana law governed the survivability issue (i.e. there was not an inconsistency under step two, supra). Under the state law, the decedent's action abated because no person with a requisite relationship to him was alive at the time of his death. Concluding that this outcome was not inconsistent with the policies of Sec. 1983, because the death was unrelated to the constitutional

violation, this court ruled that the action did not survive:

> "In order to find even a marginal influence on behavior as a result of Louisiana survivorship provisions, one would have to make the rather far fetched assumptions that a state official had both the desire and the ability deliberately to select as victims only those persons who died before conclusion of the Sec. 1983 suit for reasons entirely unconnected with the official illegality and who would not be survived by any close relative." Robertson v Wegmann 436 U.S. 584, 592, 98 S. Ct. 1991, 1996 n. 10.

The Robertson court expressly declined to express any view on the particular issue before this court today, namely, whether a state law can preclude a claim by the estate where the deprivation of constitutional rights itself caused the death. Robertson 436 U.S. 584, 594, 98 S. Ct. 1991, 1997.

But the deterrence objective of Sec. 1983 was not present in Robertson v Wegmann as it is here (and

as it was in Bell v Milwaukee and Guyton v Phillips, supra). In Robertson, death was an independent, intervening circumstance and, therefore, the court did not perceive any significant loss of deterrence if the restrictive Louisiana statute were applied. By contrast, in the instant case, (and in Bell and Guyton), the killing itself was the unconstitutional act. In such cases, there will be a substantial loss in the deterrence of official lawlessness if the victim's estate could not bring suit to recover for loss of life. Indeed, if state law could prevent a Sec. 1983 action for loss of life, then deterrence would be further subverted since it would be more advantageous to the defendant violating the constitutional rights to kill rather than injure. Bell v Milwaukee, 746 F. 2d 1239. In

Robertson, this court could not reach the question presented in the case at bar. Today, finally, this court has the opportunity to reach that question.

In making that decision, this court should consider its decision in an analogous case, Carlson v Green 446 U.S. 14, 100 S. Ct. 1458 (1980). This was an action like Bivens v Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. .388, 91 S. Ct. 1999, i.e., an action brought not against the state or local officials under Sec. 1983 but against federal officials and premised upon the constitution. In that case, the Court allowed recovery by the estate notwithstanding restrictive state law.

The action in Carlson was brought by a mother on behalf of the estate of her deceased son, alleging that federal prison officials grossly neglected his medical condition. Plaintiff argued

that defendant's acts and omissions violated the deceased's Eighth and Fourteenth Amendment rights. Under Indiana law, no recovery was available where the acts complained of caused the victim's death. Although, not explicitly discussing the component of damages for loss of life, this Court found that a uniform federal rule was necessary to achieve the Bivens policy of deterring officials from violating federal or constitutional rights so it held:

> "Whenever the relevant state survival statute would abate a Bivens type action brought against defendants whose conduct results in death, the federal common law allows survival of the action." Carlson 446 U.S. 14, 24, 100 S. Ct. 1468, 1474.

The court distinguished Robertson on the grounds that in Carlson as in the present case, the plaintiff's death was caused by the defendants'

unconstitutional acts. Carlson 436 U.S. 14, 24-25 100 S. Ct. 1468, 1474-1475.

Thus, the Carlson Court's emphasis on the need to deter officials from committing violations of constitutional rights that result in the death of the victim strongly indicates that the Ascani estate would have a claim for loss of life if Ascani had been killed by federal officers, notwithstanding inhospitable Louisiana law. Moreover, both Justices Powell and Stewart explicitly acknowledged in their concurrences that they would reach the same result in Sec. 1983 cases:

> "In Butz v Economou 438 U.S. 478, 498-504...the court thought it unseemly that different rules should govern the liability of federal and state officers for similar constitutional wrongs. I would not disturb that understanding today. Carlson v Green 446 U.S. 14, 30, 100 S. Ct. 1468, 1477.

Yet, despite the implication of Carlson v Green and Robertson v Wegmann, the Supreme Court has not yet been given the opportunity to make a specific pronouncement that the estate of victims killed under color of state law can recover for loss of life in a Sec. 1983 action notwithstanding restrictive state law. Bell v Milwaukee 746 F 2d at 1238. This is such an opportunity, one which the court should take in order to resolve the inconsistencies among the lower courts. The lower federal courts (Bell, Guyton, Jaco) are clearly and uniformly stating that the estate of a person killed under color of state law and without due process of law has a claim for relief for loss of life under Sec. 1983 and the Fourteenth Amendment notwithstanding state law which would not allow the estate to recover for loss of life. In Louisiana, though, this

constitutional question is interpreted differently by the court below:

> "Following the rationale of Robertson, there is no reason to reach a different result where the alleged constitutional violation results in death and the decedent is survived by a parent authorized to bring a wrongful death and survival action under Article 2315..." Ascani v Hughes 470 So. 2d 207, 210 (La. App. 4 Cir. 1985).

In point of fact, reaching a different result is precisely what the federal courts which have ruled on this issue have done (Bell, Guyton, Jaco) where the constitutional violation resulted in death. And, contrary to the opinion of the Louisiana Fourth Circuit (and the Louisiana Supreme Court), a review of Carlson and Robertson would give every reason to reach a different result.

The Louisiana court further asserted:

> "It is this court's opinion that the remedies under Article 2315, as applied to this case suffice

> to meet Sec. 1983, 'deterrence of official misconduct' policy. Ascani v Hughes 470 So. 2d 207, 210, supra.

It is submitted that this conclusion flies directly in the face of Bell, Guyton and Jaco. The Louisiana court's assertion that the remedies of Article 2315 suffice to meet the Sec. 1983 deterrence of official misconduct policy is flatly wrong. (See Jaco discussion of deterrence objective, P. 15-16 supra.)

The Louisiana court wrongly concluded:

> "We find nothing in Article 2315 which is 'inconsistent with the Constitution and laws of the United States'". Ascani v Hughes 470 So. 2d 211.

The Louisiana Fourth Circuit Court of Appeals (and the Louisiana Supreme Court) could not have committed more grievous error. Article 2315 as applied by the Louisiana court clearly upholds

an unconstitutional statute which is inconsistent with the policies of Sec. 1983 and which allows Louisiana state officials to summarily execute citizens with impunity. It is inconsistent in that, as applied, it is more advantageous for state officials (and city officials) to kill an individual than to injure him. It is inconsistent in that, as applied, it completely undermines the two-fold purpose of Sec. 1983 - deterrence and compensation. Persons can be killed in cold blood by state officials without compensation to anyone and without fear of reprisal from the federal courts under the Constitution.

The case at bar gives this Honorable Court its first chance to right this tragic wrong. The question before this Court is clear. It has been chiseled out by the Carlson and Robertson decisions. In Carlson, the

Court was presented with a Bivens action (federal official brought into federal court for violating the federal constitution) where the deprivation of the constitutional right actually resulted in the death of the victim. In Robertson, a state official violated Sec. 1983 and the violation did not cause death. The common factor shared by Carlson and Robertson was the fact that the action abated under state law. Carlson held that the federal common law allowed survival of the action and Robertson ruled that state law did not allow survival of the action (Appendix p. 27). The case at bar presents the only remaining fact pattern as yet unanswered by this court. It is an action in which a local official violated Sec. 1983 (Robertson) and the violation resulted in death (Carlson). Here, too, the court below has ruled

that the action is abated (or not allowed) under state law (Appendix P. 27). The question could not be clearer. The lower federal courts which have addressed this issue (Bell, Guyton, Jaco) have all agreed that the estate of a person killed under color of state law and without due process of law has a claim for relief for loss of life under Sec. 1983 and the Fourteenth Amendment despite state law which would not allow the estate to recover for loss of life. This is the better rule and one which should be adopted by this court in order to further the compensation and deterrence purposes behind Sec. 1983.

Today, this Honorable Court is presented with the facts necessary to decide this significant constitutional issue, an issue not addressed in the Robertson and Carlson cases but which today, may be addressed for the first

time.

We, therefore, urge this Court to note probable jurisdiction and to order full briefing and argument on this important constitutional issue.

II

Do the surviving siblings of the decedent Ascani possess a constitutional liberty interest in their association with him?

The Supreme Court has yet to address the question. Nevertheless, the federal constitution protects the network of core nuclear family relationships. Meyer v Nebraska 262 U.S. 390, 43 S. Ct. 625; Moore v City of East Cleveland 431 U.S. 494, 97 S. Ct. 1932.

We urge this Court to note probable jurisdiction and to order full briefing and argument on this issue.

APPENDIX

PETER A. ASCANI, SR., ET AL	*	CA-2823
	*	COURT OF APPEAL
VERSUS	*	
	*	FOURTH CIRCUIT
DARRELL HUGHES, ET AL	*	STATE OF LOUISIANA

* * * * * * * * *

APPEAL FROM THE CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS,
STATE OF LOUISIANA
NO. 84-1862, DIVISION "E"
HONORABLE GERALD P. FEDOROFF, JUDGE

* * * * * * * * *

DENIS A. BARRY, JUDGE

(Court composed of Chief Judge William V. Redmann, JJ. Patrick M. Schott and Denis A. Barry)

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MAY 8, 1985

AFFIRMED

Plaintiffs appeal the dismissal of claims by decedent's estate and his siblings for wrongful death under federal civil rights provisions. We affirm.

On February 7, 1983 David Ascani was allegedly shot and killed by two police officers and a suit for damages under state and federal law was filed:

Under La. C.C. Art. 2315:

Peter A. Ascani, Sr., Father of decedent:

Wrongful death, loss of love and affection, mental and physical pain and suffering, loss of financial support.

Peter A. Ascani, Sr., individually and on behalf of the estate of David Ascani:

Mental and physical pain and suffering, loss of life.

Under 42 U.S.C. Sec. 1983:

Peter A. Ascani, Sr., Father of decedent:

Wrongful death, loss of love and affection, mental and physical pain and suffering, loss of financial support, loss of freedom of association.

Peter A. Ascani, Sr., individually and on behalf of the estate of David Ascani:

Mental and physical pain and suffering, loss of life.

Peter A. Ascani, Jr., Anna Schmit, Darius Ascani, Jesse Ascani, Mercedes Reinerth, Darlene Boyle, siblings of decedent:

Loss of freedom of association.

Defendants' exception of no cause of action to the claims on behalf of the estate and the siblings was maintained.

The exception of no cause of action tests the legal sufficiency of the petition. All well-pleaded facts are accepted as true; the issue is whether the petition supports the redress sought. Plaquemines Parish Commission Council v Perez, 379 So. 2d 1373 (La. 1980); Scariano Brothers, Inc. v. Construction, Div. of Scheyd-Brennan, Inc., 428 So. 2d 564 (La. App. 4th Cir. 1983).

Plaintiffs allege that 42 U.S.C. Sec. 1983 provides an action on behalf

of the estate which is separate and distinct from Louisiana's Art. 2315 wrongful death and survival actions. Relying on Carlson v Green, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980), plaintiffs argue that a uniform federal rule of survivorship must be applied to prevent abatement of the estate's claim for deprivation of decedent's constitutional right to life.

42 U.S.C. Sec. 1983 provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

Section 1983 has no remedial provisions, but 42 U.S.C. Sec. 1988, provides;

> The jurisdiction in civil and criminal matters conferred on the

> district courts by the provisions of this Title (including 42 U.S.C. Sec. 1983)...shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said court in the trial and disposition of the cause...

Robertson v Wegmann, 436 U.S. 584, 98 S.Ct. 1991, 56 L.Ed.2d 554 (1978) and Brazier v Cherry, 293 F.2d 401 (5th Cir. 1961), cert. denied, 368 U.S. 921, 82 S.Ct. 243, 7 L.Ed.2d 136 (1961) set forth the following hierarchy of authority under Sec. 1988:

> Federal statutory law applies unless "not adapted to the object" or"deficient";

State law applies unless it is "inconsistent with the Constitution and laws of the United States";

Federal "common law" applies.

"Although Sec. 1988 is directed to federal district courts, it provides, by analogy, even greater justification for a state court to apply state law when the federal cause of action is adjudicated in the state court system." Ricard v State, 390 So.2d 882, 885 (La. 1980).

Because federal statutory law does not address the survival of Sec. 1983 claims, who the injured parties are when the victim is killed, or the measure of available damages, resort must be made to state law unless it is inconsistent with federal law. Robertson v Wegmann, supra; Bell v City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984).

Louisiana law most analogous to plaintiffs' Sec. 1983 claims is La. C.C. Art. 2315. Robertson v Wegmann, supra; Love v Davis, 353 F.Supp 587 (W.D.La. 1972). It allows a survival action and a wrongful death action. Callais v Allstate Insurance Co., 334 So.2d 692 (La. 1975) (on rehearing).

Unlike statutes in many states which specify a personal representative to bring the action, Art. 2315 designates three classes of beneficiaries:

> (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children;
>
> (2) the surviving father and mother of the deceased, or either of them, if there is no spouse or child surviving; and
>
> (3) the surviving brothers and sisters of the deceased, or any of them, if there is no spouse, child or parents surviving.

Persons not specified in Art. 2315 are without a remedy. Roche v Big Moose Oilfield Truck Service, 381 So.2d 396 (La. 1980). The estate of a decedent is not among the designated beneficiaries. Therefore, Mr. Ascani's claim on behalf of the estate does not state a cause of action. See Cullivan v State Farm Mutual Automobile Insurance Company, 428 So.2d 1231 (La. App. 3rd Cir. 1983), writ denied, 433 So.2d 180, 181 (La. 1983).

The narrow issue, then, is whether under these facts Art. 2315 is "inconsistent with the Constitution and laws of the United States" so as to require application of "federal common law."

In Robertson v Wegmann, supra, the issue was whether an executor could be substituted for a deceased plaintiff with no surviving parents, wife, children or siblings, or whether the action

must be dismissed on the ground of abatement. The Supreme Court, relying on Sec. 1988, discerned a deficiency in federal law to the extent that it was silent on the issue of survival of a Sec. 1983 action. It applied Art. 2315, finding nothing in the article or its underlying policies to indicate that because it caused abatement of a particular action it should invariably be ignored in favor of absolute survivorship.

The Court noted:

> It is true that Sec. 1983 provides 'a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." Mitchum v Foster, supra, 407 U.S., at 239, 92 S.Ct., at 2160. That a federal remedy should be available, however, does not mean that a Sec. 1983 plaintiff (or his representative) must be allowed to continue an action in disregard of the state law to which Sec. 1988 refers us. A state statute cannot be

> considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation. If success of the Sec. 1983 action were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant. But Sec. 1988 quite clearly instructs us to refer to state statutes; it does not say that state law is to be accepted or rejected based solely on which side is advantaged thereby. Under the circumstances presented here, the fact that Shaw was not survived by one of several close relatives should not itself be sufficient to cause the Louisiana survivorship provisions to be deemed 'inconsistent with the Constitution and laws of the United States.' 42 U.S.C. Sec. 1988. Robertson v Wegmann, supra, 436 U.S. at 593, 98 S.Ct. at 1996, 1997.

Although the Court ultimately applied Art. 2315 and denied the executor's action, it explicitly declined a view on the issue before us, i.e., whether a cause of action exists in favor of the estate despite state law which precludes such, where the alleged

deprivation of constitutional rights caused death. Robertson v Wegmann, supra, 436 U.S. at 594, 98 S. Ct. at 1997. Following the rationale of Robertson, there is no reason to reach a different result where the alleged constitutional violation results in death and the decedent is survived by a parent authorized to bring a wrongful death and survival action under Art. 2315. As explained in Robertson, supra, 436 U.S. at 590, 98 S.Ct. at 1995:

> In resolving questions of inconsistency between state and federal law raised under Sec. 1988, courts must look not only at particular federal statutes and constitutional provisions, but also at 'the policies expressed in [them].' Sullivan v Little Hunting Park, Inc., supra, 396 U.S., at 240, 90 S. Ct., at 406; see Moor v County of alameda, supra, 411 U.S., at 703, 93 S.Ct., at 1792. Of particular importance is whether application of state law 'would be inconsistent with the federal policy underlying the cause of action under consideration.' Johnson v Railway Express Agency, Inc., 421

U.S. 454, 465, 95 S.Ct. 1716, 1722 44 L.Ed.2d 295 (1975).

The fundamental policies behind Sec. 1983 are twofold. One is compensation for and the other is deterrence of unconstitutional acts committed under state law. Robertson v Wegmann, supra. It is this court's opinion that the remedies under Art. 2315, as applied to this case, suffice to meet the Sec. 1983 "deterrence of official misconduct" policy. Decedent in this case, unlike the plaintiff in Robertson, is survived by his father, and the damages available to him under Art. 2315 are broad. Ricard v State, supra; Roundtree v Technical Welding and Fabrication Company, Inc., 364 So.2d 1325 (La. App. 4th Cir. 1978), writ denied, 367 So.2d 389 (La. 1979).

Further, it is settled that "a state official contemplating illegal

activity must always be prepared to face the prospect of a Sec. 1983 action being filed against him. In light of this prospect, even an official aware of the intricacies of Louisiana survivorship law would hardly be influenced in his behavior by its provisions." Robertson v Wegmann, 436 U.S. at 592, 98 S.Ct. at 1996. As explained in Robertson, supra, 436 U.S. at 592, 98 S.Ct. at 1996 n.10: "In order to find even a marginal influence on behavior as a result of Louisiana's survivorship provisions, one would have to make the rather farfetched assumptions that a state official had both the desire and the ability deliberately to select as victims only those persons...who would not be survived by any close relatives."

The other stated policy, that of compensating the victim of the constitutional deprivation"...provides no basis

for reqiring compensation of one who is merely suing as the executor of the deceased's estate." Robertson v Wegmann, supra, 436 U.S. at 592, 98 S.Ct. at 1996.

We find nothing in Art. 2315 which is "inconsistent with the Constitution and laws of the United States,"[1] and again conclude the trial court correctly applied Louisiana law and properly sustained the exception of no cause of action with respect to the claims of decedent's estate. See Jones v George, 533 F.Supp. 1293 (S.D.W.Va. 1982).

---

[1] Plaintiff's reliance on Carlson v Green, supra, for the proposition that federal common law must be applied is misguided. Carlson is clearly distinguishable as a Bivens-type suit in which the plaintiff sought relief for violation of his constitutional rights by federal officials under a judicially-created remedy. The instant case is for constitutional violations by state officials pursuant to a federal statute.

A different situation is presented with the claim of decedent's siblings for loss of freedom of association with their brother. The siblings contend the First Amendment to the U.S. Constitution guarantees a constitutionally protected liberty interest in the continued society and companionship of their brother, the deprivation of which is fully compensable under Sec. 1983.[2]

The U.S. Supreme Court has not decided whether a sibling has a liberty interest in the continued association of a sibling, protected from unlawful state interference by the due process clause

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[2]The siblings make no claim pursuant to La. C.C. Art. 2315, recognizing that under that article the existence of a member of the preferred class of beneficiaries, i.e. decedent's father, precludes them from recovery. Ehrhard v State Farm Mutual Automobile Insurance Company, 274 So.2d 911 (La. App. 1st Cir. 1973), app. denied, 279 So.2d 202 (La. 1973)

of the Fourteenth Amendment, in the context of a Sec. 1983 death action.[3] However, federal lower courts have addressed this issue and their conclusions are persuasive.

In Sanchez v Marquez, 457 F.Supp. 359 (D.Colo. 1978), a Sec. 1983 death action was brought by representatives of the victim's estate and the victim's brothers and sisters. In denying the siblings recovery, the court held that the right of association protected by the U.S. Constitution does not extend to a Sec. 1983 action arising out of the death of one's brother.

---

[3]The issue might have been addressed, but certiorari was dismissed as improvidently granted in Jones v Hildebrant, 1,550 P.2d 339 (Colo. 1976), certiorari dismissed, 432 U.S. 183, 97 S.Ct. 2283, 53 L.Ed. 2D 209 (1977), and Espinoza v O'Dell, 633 P.2d 455 (Colo. 1981), certiorari dismissed, 456 U.S. 430, 102 S.Ct 1865, 72 L.Ed.2d 237.

The court stated:

> Where the right to raise, educate and associate with one's own child may rise to constitutional dimensions, the right of siblings to have their brother or sister continue living does not. The relationship between a parent and its off-spring and the relationship between brother and sibling is not a difference in degree, it is a difference in kind. Though one has a constitutional right to have or not have a child, one does not have a constitutional right to have or not have a brother. Sanchez v Marquez, supra at 363.

Sanchez has been cited with approval by other federal courts. Beck v Kansas University Psychiatry Foundation, 580 F.Supp. 527 (D.Kan. 1984); Sager v City of Woodland Park, 543 F.Supp. 282 (D.Colo. 1982).

In Bell v City of Milwaukee, supra, the federal Seventh Circuit reversed a district court decision, 536 F.Supp. 462 (E.D.Wis. 1982), which recognized an action for loss of society and companionship among siblings:

Moreover, if we were to hold that the federal Constitution entitles the siblings to recover for loss of society and companionship, there could be no principled way of limiting such a holding to the immediate family or perhaps even to blood relatives. Obviously many human relationships stem from the 'emotional attachments that derive from the intimacy of daily association,' but we are unwilling to attach constitutional significance to such attachments outside the closely guarded parent-child relationship. Plaintiffs suggest that we could limit a holding in their favor to blood relatives in the nuclear family, arguing that injury to relationships within the nuclear family is the reasonably foreseeable result of any wrongful death. But in any wrongful death case it is reasonably foreseeable that many persons' relationships with the deceased will end, and the rationale offered for protecting blood relatives within the immediate family also extends beyond the immediate family.

Therefore, the proffered limitations in such a holding are not viable; such a holding would require us to wander without principled guidance in deciding which, if any, of a decedent's brother, sisters, aunts, uncles, cousins or even friends could recover under federal law for the deprivation of their association

with the decedent. Bell v City of Milwaukee, supra at 1247.

We conclude that constitutional authority does not permit decedent's siblings a cause of action under Sec. 1983.

The judgment of the trial court is **AFFIRMED.**

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS

STATE OF LOUISIANA

DIVISION "E"

NO. 84-1862 DOCKET #4

PETER A. ASCANI, SR., ET AL

VERSUS

DARRELL HUGHES

JUDGMENT

For written reasons assigned,

The claims of decedent's estate and his siblings are dismissed. The claim for punitive damages against Officers Hughes and Terrence Duffy are allowed. The exceptions of no cause of action by the City and Henry Morris are sustained as to claims under 42 U.S.C. Sect. 1983, with leave to amend in 30 days.

JUDGMENT READ, RENDERED AND SIGNED this 11th day of June, 1984.

/s/ Gerald P. Federoff
J U D G E

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS

STATE OF LOUISIANA

DIVISION "E"

NO. 84-1862 DOCKET #4

PETER A. ASCANI, SR., ET AL

VERSUS

DARRELL HUGHES, ET AL

REASONS FOR JUDGMENT

Upon proper proof, plaintiff is entitled to recover punitive damages against the police officer defendants. Section 1983 creates a Federal cause of action for redress of damages inflicted under color of state law. Smith v Wade is nothing more than an interpretation of Federal law. While the majority looked to Common Law for guidance, it did not adopt the common law of any state as controlling. Section 1988 arguably suggests a different result.

But since under Smith v Wade the law of the United States now "furnished suitable remedies", there is no need to extend State law to the damage aspect of 1983 actions. Cf. Justice Rehnquist's dissent, footnote #17.

The exception of no cause of action against the claim for punitive damages against the officers will be overruled.

The result is different as to the proper claimants in this action. Sec. 1983 does not define who is "injured" by a civil rights violation resulting in death. In this respect, 1983 is "deficient" and the categorical preferences established by CC Art. 2315 are appropriately engrafted onto 1983 by Sec. 1988, thereby excluding the estate and siblings as parties plainiff.

Since the City cannot be liable for punitive damages (Newport v Fact Concerts, Inc., 453 U.S. 247 (1981)), it

makes little difference if the City is subjected to 1983 liability, since any 1983 violation would also be a 2315 tort for which the City as employer would be liable. Further, the allegations do not suggest a policy involvement of the City sufficient to support a federal claim against it. Neither do the allegations suggest that Henry Morris personally subjected the decedent to the deprivation of any rights. Plaintiff however, must be allowed to cure these deficiencies by amendment, if he can, to allege a 1983 cause of action.

NEW ORLEANS, LOUISIANA this 11th day of June, 1984.

s/s Gerald P. Federoff
J U D G E

THE SUPREME COURT OF THE STATE OF LOUISIANA

PETER A. ASCANI, SR., et al

VS. No. 85-C-1139

DARRELL HUGHES, et al

IN RE: Ascani, Peter A.; Ascani, David Nathan; Ascani, Peter A. Jr.; Schmit, Anna; Ascani, Darius; Ascani, Jesse; Reinerth, Mercedes; Boyle, Darleen; Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Fourth Circuit, Number CA-2823; Parish of Orleans Civil District Court Div. "E" Number 84-1862

June 28, 2985
Denied.

HTL
JAD
PFC
WFM
JLD
FAB
JCW

Supreme Court of Louisiana
June 28, 1985

s/s Frans Labranche
Clerk of Court
For the Court

SUPREME COURT OF THE
STATE OF LOUISIANA

NO. 85-C-1139

PETER A. ASCANI, SR., INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF DAVID NATHAN ASCANI, PETER A. ASCANI, JR., ANNA SCHMIT, DARIUS ASCANI, JESSE ASCANI, MERCEDES REINERTH AND DARLEEN BOYLE

VERSUS

DARRELL HUGHES AND TERRENCE DUFFY, INDIVIDUALLY AND IN THEIR CAPACITIES AS OFFICERS OF THE NEW ORLEANS POLICE DEPARTMENT, HENRY MORRIS, INDIVIDUALLY AND IN HIS CAPACITY AS CHIEF OF POLICE OF THE NEW ORLEANS POLICE DEPARTMENT, THE CITY OF NEW ORLEANS, THE NEW ORLEANS POLICE DEPARTMENT AND TRANSIT CASUALTY COMPANY

NOTICE OF APPEAL

Notice is hereby given that Peter A. Ascani, Sr., on behalf of the estate of David Nathan Ascani, Peter A. Ascani, Jr., Anna Schmit, Darius Ascani, Mercedes Reinerth and Darleen Boyle hereby appeal to the Supreme Court of the United States from the final judgment of this court denying Writ of

Certiorari and/or Review entered in this action on the 28th day of June 1985.

This appeal is taken pursuant to 28 U.S.C. Sec. 1257.

September 13, 1985

s/s ROY A. RASPANTI
3732 Canal Street
New Orleans, La. 70119
(504) 482-5701

STATE OF LAW
CLAIM FOR RELIEF FOR LOSS OF LIFE
UNDER SEC. 1983 AND 14TH AMENDMENT

	LAW[5]	OFFICIAL[6]	CAUSED[7] DEATH	ABATED[8]	SURVIVES[9]
[1]ROBERTSON	Sec. 1983	State	No	Yes	No
[2]CARLSON	Constitution	Fed.	Yes	Yes	Yes
[3]BELL	Sec. 1983	State	Yes	Yes	Yes
[4]ASCANI	Sec. 1983	State	Yes	Yes	?

1-9 See Appendix P. 28

[1]Robertson v Wegmann, 436 U.S. 584, 98 S. Ct. 1991

[2]Carlson v Green, 446 U.S. 14, 100 C. Ct. 1474

[3]Bell v City of Milwaukee, 746 F 2d 1205 (7 Cir., 1984)

[4]Ascani v Hughes, 470 So. 2d 207 (La. App. 4 Cir. 1985)

[5]Law Violated.

[6]Official who Violated the Law.

[7]Deprivation of Constitutional Rights Caused Death.

[8]Action not Allowed Under State Law.

[9]Action Survives Under Federal Common Law.

CERTIFICATE OF SERVICE

I certify that three copies of the foregoing Petition for Writ of Certiorari have been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto this the 20th day of September, 1985.

ROY A. RASPANTI

Supreme Court, U.S.
FILED
NOV 6 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-506

In The

Supreme Court of the United States

October Term, 1985

PETER A. ASCANI, SR., INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF DAVID NATHAN ASCANI, PETER A. ASCANI, JR., ANNA SCHMIT, DARIUS ASCANI, JESSE ASCANI, MERCEDES REINERTH AND DARLEEN BOYLE

Petitioners

VERSUS

DARRELL HUGHES AND TERRENCE DUFFY, INDIVIDUALLY AND IN THEIR CAPACITIES AS OFFICERS OF THE NEW ORLEANS POLICE DEPARTMENT, HENRY MORRIS, INDIVIDUALLY AND IN HIS CAPACITY AS CHIEF OF POLICE OF THE NEW ORLEANS POLICE DEPARTMENT, THE CITY OF NEW ORLEANS AND TRANSIT CASUALTY

Respondents

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

MOTION TO DISMISS OR AFFIRM

THOMAS P. ANZELMO - Counsel of Record
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QUESTIONS PRESENTED

I. THE ESTATE OF DAVID NATHAN ASCANI DOES NOT HAVE A CAUSE OR RIGHT OR ACTION AGAINST RESPONDENTS.

A. THE ESTATE OF DAVID NATHAN ASCANI DOES NOT HAVE A RIGHT OF ACTION UNDER LOUISIANA OR FEDERAL LAW.

B. THE ESTATE OF DAVID NATHAN ASCANI DOES NOT HAVE A CAUSE OF ACTION UNDER LOUISIANA LAW OR A CLAIM UNDER FEDERAL LAW.

II. THE SIBLINGS OF DAVID NATHAN ASCANI DO NOT POSSESS A CLAIM FOR LOSS OF ASSOCIATION WITH THEIR BROTHER.

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TABLE OF FEDERAL AND STATE STATUTES

1. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in action at law, suit in equity, or other proper proceeding for redress . . ." 42 U.S.C. Section 1983. ..... 2, 4, 6, 7, 8, 9, 10, 12

2. "The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title (Title 42) . . . shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified, and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cases is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to govern the said courts in the trial and disposition of the cause . . ." 42 U.S.C. Section 1988. ..... 2, 3, 4, 8, 10

3. "A. Every act whatever of man that causes damage to another obligates him by whose fault it happened to repair it.

   B. Damages may include loss of consortium, service, and society, and shall be recoverable by the same

respective categories of persons who would have had a cause of action for wrongful death of an injured person.

C. (1) The right to recover damages to property caused by an offense or quasi-offense is a property right which, on the death of the obligee, is inherited by his legal, instituted or irregular heirs, subject to the community rights of the surviving spouse.

(2) As used in this Paragraph, property damages may include expenses or monetary obligations necessarily incurred by the obligee on account of such offense or quasi-offense; however, if the obligee is survived by any beneficiary enumerated in the following Paragraph of this Article, such expenses or obligations shall be recoverable by said beneficiaries.

D. (1) The right to recover all other damages caused by an offense or quasi-offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of:

(a) The surviving spouse and child or children of the deceased, or either such spouse or such child or children;

(b) The surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and

(c) The surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving.

(2) The survivors in whose favor this right of action survives may also recover the damages which

they sustained through the wrongful death of the deceased.

(3) A right to recover damages under the provisions of this Paragraph is a property right which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted, or irregular heirs, whether suit has been instituted thereon by the survivor or not.

E. As used in this Article, the words 'child', 'brother', 'sister', 'father', and 'mother' include a child, brother, sister, father and mother by adoption, respectively." La. Civil Code art. 2315. ..... passim

4. "An action does not abate on the death of a party. The only exception to this rule is an action to enforce a right or obligation which is strictly personal." Louisiana Code of Civil Procedure art. 428. 7

5. "When a party dies during the pendency of an action which is not extinguished by his death, his legal successor may have himself substituted for the deceased party, on ex parte written motion supported by proof of his quality. As used in Articles 801 through 804, 'legal successor' means:

(1) 'The survivors designated in Article 2315 of the Civil Code, if the action survives in their favor . . .' " Louisiana Code of Civil Procedure art. 801. 7

6. "All specifications or assignments for error must be briefed. The Court may consider as abandoned any specification or assignment of error which has not been briefed." Louisiana Rules of Court, Uniform Rules, Courts of Appeal 2-12.4. 11

STATEMENT OF THE CASE

Accepting as true for the purposes of these proceedings only, on or about February 7, 1983, David Nathan Ascani was shot and killed by two New Orleans Police Department officers. Suit was commenced in the Civil District Court for the Parish of Orleans, State of Louisiana. Several plaintiffs, listed below, seek damages based upon various causes of action:

PLAINTIFF	RELATIONSHIP	CAUSE OF ACTION
Peter A. Ascani, Sr.	father of deceased	wrongful death
Peter A. Ascani, Sr.	father of deceased	survival action (mental and physical pain and suffering of David Nathan Ascani)
Six siblings	brothers/sisters	loss of freedom of association
Peter A. Ascani, Sr., on behalf of the Estate of David Nathan Ascani	none	mental and physical pain and suffering of David Nathan Ascani and loss of life

Defendants-respondents excepted to the claims for damages asserted by Peter A. Ascani, Sr., on behalf of the Estate of David Nathan Ascani, and the claims of the siblings of David Nathan Ascani for loss of freedom of association, for failure to state a claim recognized by law. The trial court dismissed these claims on June 11, 1984. The Louisiana Fourth Circuit Court of Appeal affirmed this decision on May 8, 1985. Writs were denied by the Louisiana Supreme Court on June 28, 1985.

ARGUMENT

I.

The Estate Of David Nathan Ascani Does Not Have A Cause Or Right Or Action Against Respondents.

The essential function of a peremptory exception of "no right of action" is to raise the question of whether a remedy afforded by law can be invoked by a particular plaintiff. *Henry v. State,* 435 So. 2d 565 (La. App. 3d Cir. 1985). The purpose of the peremptory exception of "no cause of action" is to test whether plaintiff's allegations entitle it to any remedy whatsoever at law. *McIlwain v. Manville Forest Products Corp.,* 416 So. 2d 954 (La. App. 2d Cir. 1982). The sole issue before the court in either case is whether the face of plaintiff's petition states a claim for relief recognized by law.

The Estate of David Nathan Ascani, appearing herein through Peter A. Ascani, Sr., seeks to assert a claim under Louisiana Civil Code art. 2315 and 42 U.S.C. 1983 for the violation of David Nathan Ascani's constitutional right to life. However, for the reasons set out herein, the Estate of David Nathan Ascani, as distinguished from certain relatives of the decedent, is without an action in law.

A. The Estate Of David Nathan Ascanti Does Not Have A Right Of Action Under Louisiana Or Federal Law.

One area of civil rights litigation not covered by federal law is that relating to the survival of Section 1983 actions upon the death of the plaintiff. *Robertson v. Wegmann,* 436 U.S. 584, 56 L.Ed.2d 554, 98 S.Ct. 1991 (1978). However, state statutes governing the survival of state actions do exist. This Court has held that pursuant to 42

U.S.C. 1988, applicable state law of survivorship provides the principal reference point in ascertaining the survival of civil rights actions. *Robertson, supra; Moor v. County of Alameda,* 411 U.S. 693, 36 L.Ed.2d 596, 93 S.Ct. 1785 (1973), *reh. den.* 412 U.S. 963, 37 L.Ed.2d 1012, 93 S.Ct. 2999, overruled on other grounds, *Monell v. Department of Social Services,* 436 U.S. 658, 56 L.Ed.2d 611, 98 S.Ct. 2018.

The intent of Congress to defer to state law in this regard was recognized in *Brazier v. Cherry,* 293 F.2d 401 (5th Cir. 1961); *cert. den.* 368 U.S. 921, 7 L.Ed.2d 136, 82 S.Ct. 243. *The Brazier* court noted at page 405 of its opinion:

> With a clear congressional policy to protect the life of the living from the hazard of death caused by unconstitutional deprivations of civil rights, where then do we find the statutory machinery to give effective redress after death?
>
> * * *
>
> (W)e are of the clear view that congress adopted as federal law the currently effective state law on the general right of survival. This was done by Section 1988. 293 F.2d 401 at 405.

In Louisiana, the applicable statute governing the survival of civil actions is Louisiana Civil Code art. 2315. Article 2315 represents the adoption of a statutory scheme wherein three separate and distinct classes of beneficiaries are entitled to seek recovery. These separate and mutually exclusive classes are:

1. The surviving spouse and child or children of the deceased;
2. The surviving mother and father of the deceased, if there is not a child or spouse surviving;

3. The surviving brothers and sisters of the deceased, if there is no spouse, child or parent surviving. La. Civ. Code art. 2315, *supra.*

The estate of the decedent is clearly precluded from seeking any type of recovery from any action arising from the death of an individual. The Louisiana Supreme Court has consistently held that the right of action created by Article 2315 may be exercised only by the beneficiaries enumerated in the statute, and that these classes of beneficiaries must be strictly construed. *Roche v. Big Moose Oil Field Truck Service,* 381 So. 2d 396, 399 (La. 1980).

However, Section 1988 contains a significant limitation in this regard, as state law may be applied only when it is "not inconsistent with the Constitution and laws of the United States." 42 U.S.C. Section 1988, *supra; Robertson, supra.*

Thus, the Louisiana survivorship scheme must pass constitutional muster before it may be properly engrafted onto Section 1983. In order to be consistent with federal law, *viz.* Section 1983, the applied state law must not frustrate the policies underlying federal law. *Robertson, supra.* The policy considerations of Section 1983 include compensation of persons injured by deprivations of federal rights and the prevention of abuses by those acting under the color of state law. *Robertson, supra; Carlson v. Green,* 446 U.S. 14, 64 L.Ed.2d 15, 100 S.Ct. 1468 (1980).

Louisiana Civil Code Article 2315 is not inconsistent with the Constitution or laws of United States so as to require the creation of a new rule recognizing the deceased's estate as a separate and distinct proper party plaintiff. Some states have chosen to vest the survival action with the administrator of the estate or the estate

itself; Louisiana has merely elected to vest this right with certain specified heirs of the deceased. This procedural difference between Louisiana and some other states does not render Article 2315 constitutionally defective. Moreover, the practical result of such a difference is negligible, since the proceeds of a judgment rendered in favor of "the estate" in a survival action will inevitably be distributed to the heirs of the deceased in accordance with the probate law of the particular state. Louisiana law simply eliminates a step from this process by allowing certain heirs themselves to bring the survival action.

Petitioner suffers absolutely no prejudice under Louisiana law, since the damages sought on behalf of the Estate of David Nathan Ascanti are recoverable by the proper class of beneficiaries under Article 2315. In fact, Peter A. Ascani, Sr., as the proper party plaintiff under Article 2315, presently has a claim before the Louisiana Trial Court for these very damages. Respondents do not contest the right of the father of the deceased to pursue the survival action. However, respondents vehemently object to petitioner's attempt to include the "Estate of David Nathan Ascani" as an additional party plaintiff. The recognition of such an additional party plaintiff would effectively create two survival actions for the death of one individual. Petitioner's attempt to bring a claim on behalf of the fictitious "Estate" amounts to a legal artifice designed to garner two damage recoveries from a single survival action. The Trial Court, Appellate Court and State Supreme Court refused to condone such legal maneuvering. It is respectfully submitted that this Court should also refuse to condone the same.

Additionally, this Court had an opportunity to examine and rule upon the sufficiency of the Article 2315 survivorship scheme in the context of a Section 1983 case in *Robertson, supra.* This Court concluded that Article 2315 passed constitutional muster and was not inconsistent with the Constitution and laws of the United States. This rationale was adopted by the Trial Court in its reasons for judgment:

> Section 1983 does not define who is "injured" by civil rights violations resulting in death. In this respect, 1983 is "deficient" and the categorized preferences established by Civil Code Article 2315 are appropriately engrafted onto 1983 by Section 1988, thereby excluding the estate and siblings as parties plaintiff. (*R.P.* 12).

Accordingly, it is respectfully submitted that under either a state or federal cause of action, the Estate of David Nathan Ascani has no right of action to seek damages arising out of the death of David Nathan Ascani.

B. The Estate Of David Nathan Ascani Does Not Have A Cause Of Action Under Louisiana Law Or A Claim Under Federal Law.

In addition to designating the classes of beneficiaries possessing the right to pursue an action arising out of the death of an individual, Loiusiana Civil Code art. 2315 specifies two separate and distinct bases of recovery. These avenues of redress are the survival action and wrongful death action. Louisiana Civil Code art. 2315. Each of these bases of recovery are known as a "cause of action" under Louisiana law. Petitioner, the Estate of David Nathan Ascani, now seeks to add a third basis of recovery, that being an action for "loss of life." This third basis of recovery has not been statutorily or judicially recog-

nized in Louisiana, for the reason that the damages sought under this novel claim are already available to petitioner through the survival and wrongful death actions. Moreover, this claim asserted on behalf of "the Estate" is not only redundant and repetitious; it constitutes a thinly veiled attempt to obtain a double recovery for a single allegedly wrongful act. It is respectfully submitted that because the compensatory scheme of Article 2315 does not frustrate the policies of Section 1983, this new basis of recovery should not be created or recognized in this action.

Petitioner argues that David Nathan Ascani's Section 1983 claim "abated" with his death. Petitioner's Jurisdictional Statement, pages 19, 28-29. This abatement allegedly frustrates the policies underlying Section 1983 because "it was actually to the advantage of the police officers to kill him (Ascani) rather than injure him." Petitioner's Jurisdictional Statement, page 11.

This argument is misconceived. First, the Section 1983 claim of David Nathan Ascani did not abate. Louisiana law insures that an action does not abate on the death of a party. Louisiana Code of Civil Procedure art. 428. If David Nathan Ascani had lived long enough to file suit, his father, as the sole member of the favored class of beneficiaries specified by Article 2315, could have been legally substituted as proper party plaintiff. Louisiana Code of Civil Procedure art. 801. Second, even in the absence of a suit, the cause of action of David Nathan Ascani survives. Ascani died before he could pursue his legal remedy. Nevertheless, Article 2315 preserves his action for the preferred beneficiaries. Peter A. Ascani, Sr. currently pursues this action in state court, in its entirety, just as if David Nathan Ascani were doing the same himself. Peter

A. Ascani, Sr. stands in the shoes of David Nathan Ascani. Clearly, it was not "to the advantage of the police officers to kill him rather than injure him."

Petitioner misappreciates the fact that the damage action of David Nathan Ascani has survived his death by virtue of the engraftment of Louisiana Civil Code art. 2315 upon 42 U.S.C. 1983, as provided by 42 U.S.C. Section 1988. Additionally, the damages sustained by Peter A. Ascani, Sr., in his individual capacity will be sufficiently addressed in his action for the wrongful death of his son. (See Summary of Claims, *supra*).

These two actions serve to sufficiently satisfy the policies of compensation and deterrence underlying Section 1983. In addition to the deceased's claim, which has survived in the person of Peter A. Ascani, Sr., the death of David Nathan Ascani has spawned a completely different action, that being the wrongful death suit of Peter A. Ascani, Sr. If David Nathan Ascani had survived, this action would not be maintainable. The death of David Nathan Ascani has drastically increased the defendants' potential liability exposure. Thus, by killing David Nathan Ascani, the defendants have exposed themselves to liability on two different fronts.

The case of *Bell v. City of Milwaukee*, 746 F.2d 1205 (6th Cir. 1984), involved facts very similar to those of the instant case. However, the applicable state law in *Bell* restricted non-pecuniary damages in wrongful death actions to a maximum of $25,000. The Court, after considering the magnitude of the wrongdoer's acts, held that it would be more consistent with federal policy to establish an additional basis of recovery for "loss of life" which

would not be subject to the statutory limitation. Petitioner in the instant case is not plagued with this restriction. Under Article 2315, the items of recovery (pecuniary, non-pecuniary, etc.) are merely exemplary; additionally, this statute is devoid of quantum limitations. This lack of limitations applies to both the survival and wrongful death actions. This aspect of the Louisiana compensatory scheme distinguishes this controversy from *Bell*. The nature of the Louisiana compensatory scheme, coupled with the availability of a wrongful death action in this particular case, clearly demonstrates that it was not "to the advantage of the police officers to kill him rather than injure him."

Furthermore, this controversy is distinguishable from *Bell* on other grounds. The Wisconsin survival scheme provides redress for damages inflicted upon the deceased during his lifetime. In *Bell*, the jury found that no deprivation of the deceased's constitutional rights had occurred prior to death. 746 F.2d at 1236, 1278-9. Additionally, the deceased's death was apparently instantaneous. 746 F.2d at 1215. Thus, under the facts of *Bell*, the deceased was not technically injured during his lifetime. Any claim for the civil rights violations inflicted upon the deceased abated. However, the factual circumstances of *Bell* are not presently before this Court. Louisiana law does not bar survival of David Nathan Ascani's Section 1983 claim. This cause of action survives in the person of Peter A. Ascani, Sr. The disposition of this claim is pending at this very moment in the Trial Court in Louisiana. Louisiana law has in no way impeded the ability of petitioner to seek redress for the civil rights violations allegedly inflicted upon David Nathan Ascani. Thus, *Bell* does not present persuasive authority in this instance. The instant case is also

distinguishable from *Jaco v. Bloechle*, 739 F.2d 239 (6th Cir. 1984) for exactly the same reasons stated hereinabove.

Petitioner is misled by his interpretation of the cases of *Carlson v. Green*, 446 U.S. 14, 64 L.Ed.2d 15, 100 S.Ct. 1468 (1980), and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 29 L.Ed.2d 619, 91 S.Ct. 1999 (1971). These cases apply only to the limited set of circumstances wherein a victim of a constitutional violation by a federal agent has a right to recover damages against the official in federal court, despite the absence of any statute conferring such a right.

The defendants in the instant case were acting under color of state law. Section 1983 provides a statutory avenue of redress in the latter situation. The victim's action is preserved by virtue of the adoption of the survivorship clause of Article 2315 through Section 1988. Thus, unlike the scenarios presented in *Carlson* and *Bivens*, there is no need for the creation of a new cause of action in order for a court to adequately address the alleged deprivation of constitutional rights, because one presently exists.

Under the facts of this case, Article 2315 is not inconsistent with the Constitution or laws of the United States so as to require the creation of a new rule recognizing the deceased's estate as a separate and distinct proper party plaintiff. Petitioner suffers no prejudice under Louisiana survivorship law, since the damages alleged for "loss of life" are recoverable through the pending survivorship or wrongful death actions, or both. Louisiana law provides ample bases for litigation of his claim to a just and equitable conclusion. Accordingly, it is respectfully submitted that under either state or federal law, the Estate of

David Nathan Ascani has no cause of action to seek damages arising out of the death of David Nathan Ascani.

II.

The Siblings Of David Nathan Ascani Do Not Possess A Claim For Loss Of Association With Their Brother.

Louisiana Civil Code art. 2315, *supra,* deprives the siblings of David Nathan Ascani of a cause of action against respondents, because any cause of action which does exist, exists only on behalf of the surviving father of David Nathan Ascani. Under the circumstances of this case, Louisiana law vests both the wrongful death and survival actions with the parent(s) of the deceased. Respondent adopts the arguments made in Part I of this Brief in this regard, as if copied *in extenso* herein. Alternatively, even assuming, *arguendo,* that a claim for loss of association exists, it would exist only in favor of Peter Ascani, Sr.; he abandoned this claim by not designating it or briefing it as an issue when this matter was appealed to the Louisiana Fourth Circuit Court of Appeal. Louisiana Rules of Court, Uniform Rules Courts of Appeal, Rule 2 Section 12.4, *supra.*

Moreover, the United States Seventh Circuit Court of Appeal recently presented compelling reasons which counsel against the recognition of such a right between brothers and sisters. In *Bell v. City of Milwaukee, supra,* the Court explained its holding as follows:

> Moreover, if we were to hold that the Federal Constitution entitles the siblings to recover for loss of society and companionship, there could be no principled way of limiting such a holding to the immediate family or perhaps, blood relatives. Obviously, many human relationships stem from the "emotional

> attachments that derive from the intimacy of daily association," but we are unwilling to attach constitutional significance to such attachments outside the closely guarded parent-child relationship. Plaintiff suggests we could limit a holding in their favor to blood relatives in the nuclear family . . . (but) such a holding would require us to wander without principled guidance in deciding which, if any, of a decedent's brothers, sisters, aunts, uncles, cousins, or even friends could recover under federal law for the deprivation of their association with decedent. 764 F.2d 1205, 1247.

In the present case, although an action for the deceased's wrongful death may descend to certain relatives, any such action cannot descend to the siblings of David Nathan Ascani, as they are pre-empted from filing suit under Louisiana Civil Code art. 2315. Furthermore, there is no constitutional right of association which would be redressed in a Section 1983 action arising out of the death of one's brother. Respondents suggest that the reference to "the party injured" in Section 1983 creates an action which may be exercised by the victim of a constitutional violation, or his survivor in the event of death. This language, respondents aver, creates a basis of redress for the victim of a civil rights violation; Section 1983 does not address the grievances of those with a related interest.

CONCLUSION

No claim for relief exists at law for the Estate or siblings of David Nathan Ascani in this case. Only the father of the deceased, Peter A. Ascani, Sr., has a right of action and cause of action for relief. He currently has both a survival action and wrongful death action

pending in Louisiana. These claims await disposition on the merits in state court. The afforded avenues of relief will fully redress any violation of the civil rights of David Nathan Ascani, if the trier of fact eventually concludes that such violations occurred. A denial of certiorari in this case will not prejudice, interfere with, or terminate either of these actions. Since there is no conflict between the law of Louisiana as set forth above, and the Constitution and laws of United States, it is respectfully submitted that the instant matter does not present this Court with a case which would merit a full briefing and argument on the issues presented.

Respectfully submitted,

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